Supreme Court, U.S.
FILED

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No. ____

IN THE

Supreme Court of the United States

DAVID ACOSTA

Petitioner,

v.

MARIE D. CAMPBELL, ET AL,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals For the Eleventh Circuit

APPENDIX

To

PETITION FOR A WRIT OF CERTIORARI

David Acosta
3229 Yattika Place
Longwood, Florida 32779
407-915-4713

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Only the Westlaw citation is currently available.This case was not selected for pub-lication in the Federal Reporter.

Not for Publication in West's Federal Re-porter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Eleventh Circuit Rules 36-2, 36-3. (Find CTA11 Rule 36-2 and Find CTA11 Rule 36-3)

United States Court of Appeals,

Eleventh Circuit.

David ACOSTA, Plaintiff-Appellant,

v.

Marie D. CAMPBELL, Gregg Dreilinger, Law Offices of David J. Stern, P.A., Citi-mortgage, Inc., Citibank, FSB, Imelda W. Lay, Mortgage Capital Associates, Inc., Jay M. Steren, and Residential Funding Corp., Defendants-Appellees.

No. 07-10373

Jan. 28, 2009.

Background: Debtor sued, inter alia, debt collectors on multiple theories, including violations of the Fair Debt Collection Prac-tices Act (FDCPA). The United States Dis-trict Court for the Middle District

of Florida, 2006 WL 3804729, granted summary judgment against the debtor, and he appealed.

Holding: The Court of Appeals held that communication from a foreclosing party's counsel to counsel for a second mortgage holder regarding the foreclosure was not subject to the FDCPA.

Affirmed.

Antitrust and Trade Regulation 29T 214

29T Antitrust and Trade Regulation

29TIII Statutory Unfair Trade Practices and Consumer Protection

29TIII(C) Particular Subjects and Regulations

29Tk210 Debt Collection

29Tk214 k. Communications, Representations, and Notices; Debtor's Re-sponse. Most Cited Cases

Communication from a foreclosing party's counsel to counsel for a second mortgage holder regarding the foreclosure was not subject to the Fair Debt Collection Practices Act (FDCPA); the communication did not implicate the debtor's privacy interests be-cause the second mortgage holder would necessarily have known about the debtor's default through the foreclosure proceedings, and moreover, the communication was not for the purpose of harassing or embarrassing the debtor, and did not jeopardize his em-ployment. Fair Debt Collection Practices Act, § 805(b), 15 U.S.C.A. § 1692c(b).

Eric P. Schroeder, Powell Goldstein LLP, Atlanta, GA, for Plaintiff-Appellant.

Trevor George Hawes, Joseph T. Kissane, Cole, Scott & Kissane, P.A., Christopher Lee Casey, Hinshaw & Culbertson LLP, Jacksonville, FL, Jack J. Aiello, Gunster, Yoakley & Stewart, P.A., Meenu T. Sasser, Gunster, Yoakley, Valdes-Fauli, et al., West Palm Beach, FL, James H. Wyman, Hinshaw & Culbertson, LLP, Ft. Lauderdale, FL, for Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Florida. D.C. Docket No. 04-00761-CV-ORL-28DAB.

Before WILSON and PRYOR, Circuit Judges, and MIDDLEBROOKS,FN* District Judge.

PER CURIAM.

*1 David Acosta, Appellant, appeals pro se the district court's grant of summary judg-ment against Appellant and in favor of De-fendants-Appellees, attorneys Marie D. Campbell and Gregg Dreilinger; the Law Offices of David J. Stern, P.A. (the "Law Office"); Citimortgage, Inc. ("Citimort-gage"); Citibank, FSB ("Citibank"); Mort-gage Capital Associates, Inc. ("MCA"); Residential Funding Corp.; Jay M. Stern, president of MCA; Imelda W. Lay, an em-ployee of MCA; and John Does 1-20, in Appellant's pro se action under the Rack-eteer Influence and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 et seq.; the Florida Civil Remedies for Criminal Prac-tices Act ("Florida RICO"), Fla. Stat. § 772.101 et seq.; the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692 et seq.;

Florida's Fair Consumer Collection Practices Act ("FCCPA"), Fla. Stat. § 501.201 et seq.; and the Florida Unfair and Deceptive Acts and Practices Act ("FDUP-TA"), Fla. Stat. § 501.201 et seq.

Background

In January of 2000, Petitioner, David Acos-ta, while living in Pennsylvania, began the process of entering into two purchase-money loan transactions to finance the purchase of residential property located in Longwood, Florida. [Red Br. 3]. MCA, a correspondent lender for CitiMortgage and Citibank originated both of the loans: the first for $460,000, and the second for $57,000. Id. MCA and Acosta closed the first Mortgage on March 24, 2000, and MCA assigned the first mortgage loan to CitiMortgage. [Red Br. 3]. The assignment of the first mortgage was recorded on April 5, 2000. Id .

Thereafter, MCA sent a letter to Acosta requesting that he execute a "Florida specific note" for the first mortgage, advising him in a subsequent letter on April 18, 2000, that "[Citimortgage] will return to us the note previously signed ...".Id. Appellant executed a new promissory note for $460,000 on April 20, 2000 in favor of MCA. [Bl. Br. 7]. At some point after the closing but prior to February 2003, CitiMortgage endorsed the promissory note securing the first mortgage to Citibank, however; CitiMortgage did not deliver the assignment of the Mortgage to Citibank until September 7, 2004. [Bl. Br. 7, Red Br. 5]. In February of 2003, Acosta stopped paying his mortgage because his "closer examination of the [loan] transaction revealed fraud," and has not made

a pay-ment thereafter on the first mortgage. [Bl. Br. 8, Red. Br.4].

On July 11, 2003. CitiMortgage sent a letter to Acosta advising that the first mortgage was in default, and that the loan was referred to the Law Office for the commencement of foreclosure proceedings. [Red. Br. 5, Bl. Br. 8]. On July 11, 2003, Law Office "delivered for filing" a foreclosure Complaint on behalf of Citimortgage against Acosta in state court. [Red Br. 5]. On July 12, 2003, Acosta sent a certified letter, with a certificate of service dated July 14, 2003, to the Law Office providing his "Notice of Dispute and Debt Validation Request" pursuant to 15 U.S.C. § 1692g. [Red. Br. 5, Bl. Br. 9]. On July 16, 2003, the Clerk's office docked the foreclosure Complaint, with leave to amend. [Red. Br. 5]. At that time, CitiMortgage had not yet assigned the mortgage to Citibank, therefore, the foreclosure action was insti-tuted in the name of the mortgagee, Citi-Mortgage. [Red. Br. 40]. The foreclosure action was later dismissed, without preju-dice, because Citibank was deemed a non-joined indispensable party. [Red. Br. 41]. Citibank then appeared as plaintiff in the re-filed foreclosure action as the hold and own-er of both the note and the mortgage. Id .

*2 On or about May 21, 2004, Acosta insti-tuted this federal court action against Law Office. An exhaustive recitation of the ex-tensive procedural history of the federal ac-tion is not necessary. Instead, we will set forth the disposition of Acosta's claims in the Third Amended Complaint against the parties who ultimately became the Defen-dants-Appellees.

The Third Amended Complaint set forth five counts: Count I alleged violations of RICO, 18 U.S.C. §§ 1961, 1962 et seq.; Count II alleged violations of Florida RICO; Count III alleged violations of the FDCPA, 15 U.S.C. § 1692, et seq.; Count IV alleged a violation of the FCCPA, Fla. Stat. § 559.55, et seq.; and Count V alleged a violation of FDUPTA, Fla. Stat. § 501.201 et seq. On August 22, 2005, the Law Office and Citimortgage filed motions to dismiss the Third Amended Complaint, and on October 3, 2005, Citibank filed its motion to dismiss the same. On September 19, 2005, Magistrate Judge Baker heard oral argument on Citimortgage and the Law Office's motions to dismiss. On October 26, 2005, Residential Funding Corporation filed its motion to dismiss the Third Amended Complaint. MCA never filed a motion to dismiss.

On November 4, 2005, Magistrate Judge Banker issued a Report and Recommenda-tion ("R & R"), addressing the motions filed by Citimortgage, Inc., the Law Office, and Citibank, FSB. The R & R did not address the motions filed by Defendant, Residential Funding Corporation, but recommended dismissal against both Residential Funding Corporation and MCA. The Report and Recommendation recommended the dismis-sal of Counts I (RICO), II (Florida RICO), and V (FDUTPA), with prejudice, and rec-ommended that most claims in Counts III and IV (FDCPA and FCCPA claims) be dismissed.

Overruling Acosta's objections to the R & R, on January 19, 2006, Judge Antoon adopted the Magistrates Report and Recommenda-tion in full, dismissing all but two of peti-tioner's claims, as stated above. The two is-sues that remained were: (1)

whether defen-dants violated the FDCPA when Defendants continued with mortgage foreclosure proceedings (filing the service of the complaint) even though they had allegedly had already received correspondence from Petitioner disputing the debt; and (2) whether defendants violated the FDCPA for failing to communicate to credit reporting agencies that the debt owed by Plaintiff was disputed. Defendants moved for summary judgment on Petitioner's remaining claims on June 16, 2006. The Magistrate judge's Report and Recommendation recommended granting summary judgment in favor of Defendants and against Acosta on both claims. Judge Antoon adopted the Report and Recommendation on December 22, 2006. Judgment was entered in favor of MCA, Jay M. Steren, Imelda W. Lay and Residential Funding Corporation on December 22, 2006, and in favor of the Law Office, Citimortgage, and Citibank on December 26, 2006. Acosta appeals from this judgment.

Standard of Review

*3 This Court reviews de novo both a district court's grant of a motion to dismiss under 12(b)(6) for failure to state a claim, and a district court's grant of summary judgment. Hill v. White, 321 F.3d 1334, 1335 (11th Cir.2003).

A Rule 12(b)(6) motion to dismiss tests the sufficiency of the complaint against the legal standard set forth in Rule 8: "a short and plain statement of the claim showing that the pleader is entitled to relief."Fed.R.Civ.P. 8(a)(2). We liberally construe pro se plead-ings. Butler v. Prison Health Services, Inc., Slip Copy, 2008 WL 4291321, * 1,citing Brown v. Johnson, 387 F.3d 1244, 1350 (11th

Cir.2004). However, a complaint "re-quires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 127 S.Ct. 1955, 1965, 167 L.Ed.2d 929 (2007) (citation omitted). Factual allegations in a complaint need not be detailed but "must be enough to raise a right to relief above the speculative level ... on the assumption that all the allega-tions in the complaint are true (even if doubtful in fact)." Id. at 1964-65 (citations omitted). For the purpose of the motion to dismiss, the complaint is construed in the light most favorable to the plaintiff, and all facts alleged by the plaintiff are accepted as true. Hishon v. King & Spaulding, 467 U.S. 69, 73, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984). Regardless of the alleged facts, however, a court may dismiss a complaint on a dispositive issue of law. Marshall County Bd. of Educ. v. Marshall County Gas Dist., 992 F.2d 1171, 1174 (11th Cir.1993).

Summary judgment is appropriate only when there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law.Fed.R.Civ.P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The moving party bears the burden of meeting this exacting standard. See Adickes v. S.H. Kress & Co., 398 U.S. 144, 157, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). In applying this standard, the evidence, and all reasona-ble factual inferences drawn therefrom, must be viewed in the light most favorable to the non-moving party. See Arrington v. Cobb County, 139 F.3d 865, 871 (11th Cir.1998); Allen v. Tyson Foods, Inc., 121 F.3d 642, 646 (11th Cir.1997).

The non-moving party, however, bears the burden of coming forward with evidence of each essential element of their claims, such that a reasonable jury could find in their fa-vor. See Earley v. Champion Int'l Corp., 907 F.2d 1077, 1080 (11th Cir.1990). The non-moving party "[m]ay not rest upon the mere allegations and denials of [its] pleadings, but [its] response ... must set forth specific facts showing that there is a genuine issue for trial."Fed.R.Civ.P. 56(e)."The mere existence of a scintilla of evidence in support of the [non-movant's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-movant]." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Further, conclusory, uncorroborated allegations by a plaintiff in an affidavit or deposition will not create an issue of fact for trial sufficient to defeat a well supported summary judgment motion. See Earley, 907 F.2d at 1081. The failure of proof concern-ing an essential element of the non-moving party's case necessarily renders all other facts immaterial and requires the court to grant the motion for summary judgment. See Celotex, 477 U.S. at 322.

Discussion

*4 After careful review of the record, we find no reason to disturb the well-reasoned opinions of the district court granting sum-mary judgment in favor of defendants and against Acosta on the remainder of Petition-er's FCCPA and FDCPA claims. We also affirm the district court's dismissal with pre-judice of Petitioner's FDCPA claims, federal RICO claims, Florida RICO claims, Florida Consumer Collection Practices Act ("FCCPA") claims, and Florida

Deceptive and Unfair Trade Practices Act ("FDCPA") claims.

However, one claim raised by Appellant requires more discussion. Appellant claimed that the defendants, Citimortgage, Citibank, and the Law Office, violated 15 U.S.C. § 1692c(b) by "communicating with a third-party information about the debt without prior consent of the consumer."[Third Amended Complaint, ¶ 133(c)]. Specifical-ly, Acosta argues that on October 2, 2003, Dawn Desmond and Claudia Bunge, Des-mond's supervisor, both employees of the Law Office, sent a letter with information about Acosta's alleged debt to Marshall C. Watson, P.A., attorneys for another of Acos-ta's creditors. [R 103 ¶ 121-23.] The communication was a confidential payoff letter provided at the request of the Watson, P.A. law firm, attorney for the MCA, the second mortgage holder of the Florida residence, that was a defendant in the foreclosure ac-tion and a co-defendant in the present action. [Red Br. 36-37].

Under the FDCPA:

Except as provided in section 804 [15 USCS § 1692b], without the prior consent of the consumer given directly to the debt collec-tor, or the express permission of a court of competent jurisdiction, or as reasonably necessary to effectuate a postjudgment judicial remedy, a debt collector may not communicate, in connection with the col-lection of any debt, with any person other than the consumer, his attorney, a con-sumer reporting agency if otherwise per-mitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector.

15 U.S.C. § 1692c(b).

The district court adopted the magistrate judge's Report and Recommendation that found that "because it was a confidential payoff letter provided at the request of Wat-son, P.A., who is the attorney for another creditor, the second mortgage holder, involved in the foreclosure," and "[a]ttorneys for creditors are excluded from application of the FDCPA," Acosta failed to state a claim. The Report and Recommendation fur-ther stated that "as a practical matter, in a state foreclosure action, the first and second mortgage holders and other creditors must be able to communicate regarding the bal-ance or settlement of the outstanding mortgages."[R 132 p. 24]. We agree that the let-ter sent to the attorney for the second mort-gagee is not an action proscribed by the FDCPA.

Congress enacted the Fair Debt Collection Practices Act "to eliminate abusive debt col-lection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses."15 U.S.C. § 1692(e). The FDCPA prohibits unfair or unconscionable collection methods, conduct which harasses, oppresses or abuses any debtor, and the making of any false, misleading, or deceptive statements in connection with a debt, and it requires that collectors make certain disclosures. 15 U.S.C. §§ 1692d, 1692e, 1692f. The FDCPA applies to "debt collectors," as de-fined as "any person who uses any instru-mentality of interstate commerce or the mails

in any business the principal purpose of which is the collection of any debts FN**, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another."15 U.S.C. § 1692a(6).Title 15 U.S.C. 1692e generally prohibits the use of any false, de-ceptive, or misleading representations or means to collect a debt. 15 U.S.C. § 1692e.

*5 Petitioner argues that: "[a] plain reading of [the state] indicates that the only third parties with whom a debt collector may communicate with are its own attorney or the attorney consumer," and that "[t]he sta-tute does not create a blanket exception for all attorneys of all creditors to communicate about a consumer's disputed debt."[Bl. Br. 33]. Therefore, Petitioner contends that the letter sent to the attorneys for the second mortgage holder, at the second mortgage holder's request, constitutes an violation of 15 U.S.C. § 1692c(b).

Defendants respond with three primary arguments. First, the foreclosure action was not a "debt collection" under the statute, and therefore the events surrounding the mortgage foreclosure are not subject to the FDCPA. [Red Br. 37]. Second, that MCA's attorneys are not "third parties" under 15 U.S.C. § 1692c(b) because they a defendant with an interest in the mortgage foreclosure proceeding. [Red Br. 37-38]. Third, defen-dants argue that the communication was "reasonably necessary to effectuate a post-judgment remedy" because "when the priority of the involved mortgages remains to be determined by the same lawsuit, the mortgage information is necessary to a proper evaluation of potential post judgment remedies."FN***[Red Br. 38].

We need not address the Defendant's arguments because we can resolve the appeal on another ground. Our analysis in Vega v. McKay, 351 F.3d 1334 (11th Cir.2003) (per curiam) FN**** is instructive. In Vega, we af-firmed the district court's ruling that the complaint package, consisting of a civil complaint, a summons to appear for a pretrial conference, and a FDCPA notice, was not an "initial communication" within the mean-ing of the FDCPA. Id. at 1335-36.Like the plaintiff-appellant in Vega, Acosta was served with a foreclosure complaint in which a FDCPA notice was attached. Based on our holding in Vega, that a foreclosure package including a FDCPA notice is not an "initial communication," under 15 U.S.C. § 1692g, it follows that a communication made by the a party in a foreclosure action or its counsel regarding the foreclosure action is not a "communication" under 15 U.S.C. § 1692c(b).

The FDCPa was passed in 1977 in order protect consumers from unfair debt collec-tion practices. "A debt collector may not en-gage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt."15 U.S.C. § 1692d. Additionally, the House Report on the FDCPA states: "a debt collector may not contact third persons such as a consumer's friends, neighbors, relatives, or employer. Such contacts are not legitimate collection practices and result in serious invasions of privacy, as well as the loss of jobs."S.Rep. No. 95-382, reprinted at 1977 U.S.Code Cong. & Admin.News 1695, 1699.

In this case, the communication between the attorneys for the two creditors does not im-plicate

Acosta's privacy interests because the second mortgage holder would necessarily know about Acosta's default through the foreclosure proceedings. In addition, the communication was not for the purpose of harassing or embarrassing Acosta, nor did it jeopardize his employment. Based on our reasoning in Vega, we hold that a communi-cation issued from foreclosing party, or its counsel, regarding the foreclosure, does not violate 15 U.S.C. § 1692c(b), as such a communication is not subject to the FDCPA. FN*****

*6 For the foregoing reasons, we AFFIRM the district court.

FN* Honorable Donald M. Middle-brooks, United States District Judge for the Southern District of Florida, sitting by designation.

FN** The FDCPA defines "debt" as "any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or ser-vices which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment."15 U.S.C. 1692a(5).The FDCPA defines "creditor" as "any person who offers or extends credit creating a debt or to whom a debt is owed."15 U.S.C. 1692a(3).

FN*** This argument is unavailing: the communication occurred before there was a judgment in the foreclo-sure action, therefore; the communi-cation could not reasonably be said to "effectuate a postjudgment reme-dy."

FN**** Petitioner argues Vega should be overturned because it un-dermines the consumer rights under FDCPA when creditors attach FDCPA

notices to the complaint or summons, but Vega is binding au-thority that can be overruled only by the Court sitting en banc. McGinley v. Houston, 361 F.3d 1328, 1331 (11th Cir.2004) (citation omitted) (stating that the "Eleventh Circuit follows the absolute rule of the Fifth Circuit that a prior decision of the circuit panel or en bank cannot be overruled by a panel but only by the court sitting en banc").

FN***** This holding does not limit the proscriptions of 15 U.S.C. § 1692c(b) to allow debt collectors, who are not mortgagees in foreclo-sure actions, to communicate with any other creditors the debtor may have. Such a premise would contra-vene many of protections offered by the FDCPA.

C.A.11 (Fla.),2009.

Acosta v. Campbell

Slip Copy, 2009 WL 190089 (C.A.11 (Fla.))

END OF DOCUMENT

Acosta v. Campbell 2006 WL 146208 (M.D.Fla.)

Only the Westlaw citation is currently available.

United States District Court,

M.D. Florida.

David ACOSTA, Plaintiff,

v.

Marie D. CAMPBELL, Gregg Dreilinger, Law Offices of David J. Stern, P.A.,

Citimortgage, Inc., Citibank, FSB, Imelda W. Lay, Mortgage Capital Associates,

Inc., Residential Funding Corporation, Jay M. Steren, John Does 1-20,

Defendants.

No. 6:04CV761ORL28DAB.

Jan. 18, 2006.

David Acosta, Longwood, FL, pro se.

Miriam L. Mendieta, Law Office of David J. Stern, P.A., Plantation, FL, Geoffrey D. Sessions, Christopher L. Casey, H. Keith Thomerson, Hinshaw & Culbertson, Jacksonville, FL, Meenu T. Sasser,

Gunster, Yoakley & Stewart, P.A., West Palm Beach, FL, J. Joaquin Fraxedas, Fraxedas Mediation Firm, Maitland, FL, for Defendants.

ORDER

ANTOON, J.

*1 This case is before the Court on Defendant' Marie D. Campbell, Gregg Dreilinger, and the Law Offices of David J. Stern, P.A., Motion to Dismiss Third Amended Complaint (Doc. No. 104), Citimortgage, Inc.'s Motion to Dismiss Third Amended Complaint (Doc. No. 105), and Citibank, Federal Savings Bank's Motion to Dismiss Third Amended Complaint (Doc. No. 116). The United States Magistrate Judge has submitted a report recommending that these motions be granted in part.

After an independent de novo review of the record in this matter, and considering the responses filed, the Court agrees entirely with the findings of fact and conclusions of law in the Report and Recommendation. Therefore, it is ORDERED as follows:

1. That the Report and Recommendation filed November 4, 2005 (Doc. No. 132) is ADOPTED and CONFIRMED and made a part of this Order.

2. Defendant' Marie D. Campbell, Gregg Dreilinger, and the Law Offices of David J. Stern, P.A., Motion to Dismiss Third Amended Complaint (Doc. No. 104), Citimortgage, Inc.'s Motion to Dismiss Third Amended Complaint (Doc. No. 105),

and Citibank, Federal Savings Bank's Motion to Dismiss Third Amended Complaint (Doc. No. 116) are GRANTED in part. Specifically, Plaintiff's federal and Florida RICO claims (Counts I and II) and his FDUTPA claim (Count V), are DISMISSED with prejudice. The portion of the motions to dismiss seeking dismissal of Plaintiff's FDCPA and Florida Consumer Credit Protection Act claims (Counts III and IV) is GRANTED in part and DENIED in part, specifically Plaintiff's claims in ¶ ¶ 133(b), (c), (e), (f)--(i) are DISMISSED with prejudice. Plaintiff's claims in ¶ ¶ 133(a) and (d) remain.

DONE and ORDERED.

REPORT AND RECOMMENDATION

BAKER, Magistrate J.

TO THE UNITED STATES DISTRICT COURT

This cause came on for consideration with oral argument on the following motions filed herein:

MOTION: DEFENDANTS' MARIE D. CAMPBELL, GREGG DREILINGER, AND THE LAW OFFICES OF DAVID J. STERN, P.A., MOTION TO DISMISS THIRD AMENDED

COMPLAINT (Doc. No. 104)

FILED: August 22, 2005

THEREON it is RECOMMENDED that the motion be GRANTED in part.

MOTION: CITIMORTGAGE, INC.'S MOTION TO DISMISS THIRD AMENDED COMPLAINT (Doc. No. 105)

FILED: August 22, 2005

THEREON it is RECOMMENDED that the motion be GRANTED in part.

MOTION:

CITIBANK, FEDERAL SAVINGS BANK'S MOTION TO DISMISS THIRD AMENDED COMPLAINT (Doc. No.

116)

FILED: October 3, 2005

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THEREON it is RECOMMENDED that the motion be GRANTED in part.

CitiMortgage, Inc. began foreclosure proceedings on July 16, 2003 against David Acosta in state court for failure to pay the mortgage on his residence. Acosta subsequently filed suit in this Court on May 21, 2004, against the law firm foreclosing on the mortgage, alleging violations of the federal Fair Debt Collection Practices Act, [FN1] 15 U.S.C. § 1692. Doc. No. 1.

FN1. On November 30, 2004, Acosta filed an Amended Complaint (Doc. No. 37) against Defendants Marie D. Campbell, Gregg Dreilinger, Law Offices of David J. Stern, P.A.

*2 Approximately one year later, Acosta amended his Complaint to allege additional claims [FN2] against the mortgage holder, CitiMortgage, Inc., for violations of the federal Racketeer

Influenced And Corrupt Organizations Act and its Florida counterpart, as well as state law claims. CitiMortgage, Inc., Citibank, FSB, and the Law Offices of David J. Stern with two of its attorneys now move to dismiss the claims against them set forth in Acosta's operative complaint. Doc. No. 104, 105, 116. Because the Court finds that the majority of Acosta's allegations fail to state a claim upon which relief can be granted, it is RECOMMENDED that the Motions to Dismiss be GRANTED in part as set forth herein.

FN2. Acosta also alleges claims against several others allegedly involved in obtaining the mortgage: Mortgage Capital Associates, Inc ., Residential Funding Corporation, Jay M. Steren, Imelda W. Lay, and "John Does 1-20."

I. FACTUAL BACKGROUND [FN3]

FN3. For purposes of the Motion to Dismiss, the facts alleged in Plaintiff's Third Amended Complaint are accepted as true. Brown v. Crawford County, Georgia, 960 F.2d 1002, 1010 (11th Cir.1992) ("[f]or a motion to dismiss to be granted, plaintiff's complaint, factually accepted as correct, must evidence that there is no set of facts entitling him to relief").

In January 2000, Acosta, while residing in Pennsylvania, sought to purchase a home in Florida and relocate [FN4] to the state. Doc. No. 103 ¶ 16. On March 24, 2000, Acosta executed a Promissory Note and a purchase money mortgage with Mortgage Capital Associates on the real property at 3229 Yattika Place, Longwood, Florida 32779 for $460,000 (the "First Mortgage"). Id. Ex. DD-6 & 7. At the same time, Acosta and his wife also executed a second mortgage [FN5] for $57,500 in favor of Mortgage

Capital Associates (the "Second Mortgage"). Id. Ex. DD-33. On March 24, 2000, MCA assigned the First Mortgage to Citibank Mortgage, Inc. Id. Ex. DD-8; ¶ 32. The First Mortgage Promissory Note was then conveyed by Mortgage Capital Associates to Citicorp Mortgage, Inc. (CitiMortgage's predecessor), who conveyed it to Citibank, FSB. Id. Ex. DD-8. On September 7, 2004, to correct defects in the pleadings in the foreclosure action, CitiMortgage, Inc. (f/k/a Citicorp Mortgage, Inc .) assigned the First Mortgage to Citibank, FSB. Id. Ex. DD-21 att.

FN4. Acosta resided in Pennsylvania until October 2000. Id. ¶ 24.

FN5. Citibank, FSB served an amended complaint in the state court foreclosure on September 8, 2004, alleging that Acosta's second mortgage-- executed the same day as the purchase money First Mortgage--had inadvertently been recorded ahead of Citibank's Mortgage. Id. Ex. DD-21.

At some point following execution of the First Mortgage on March 24, 2000, Imelda Lay of Mortgage Capital Associates sent an undated letter to Acosta stating:

I have just been informed by the investor of your first trust deed that they required a Florida specific note. It was the opinion of our legal and document department that we do not require a state specific note if it is an adjustable. We were wrong. So here I am cleaning something else up.

I would really appreciate it, if you would be kind [sic] to sign this document and to forward it immediately to the investor.

Id. Ex. DD-37. Following that correspondence, on April 18, 2000, Ms. Lay wrote to Acosta again to say "how [Mortgage Capital Associates] will handle the original note that is outstanding on the multistate fixed/adjustable rate note." Id. Ex. DD-36. "Citicorp Mortgage will return to us the note previously signed by you immediately upon their receipt of the new note." Id.

Acosta contends that in February 2003, he began to "suspect something was wrong" [FN6] with his mortgage loan transaction and therefore stopped making payments to CitiMortgage. Id. ¶ 80. In July 2003, Citibank sued Acosta for defaulting on the First Mortgage as of February 1, 2003, with an unpaid balance of $461,728. Id. Ex. DD-21. Citibank retained the Law Office to initiate the foreclosure action against Acosta. Id. ¶ 81. On July 14, 2003, Acosta sent a Notice of Dispute and Debt Validation Request seeking verification of the alleged debt to the Law Office; the Notice arrived at the Law Office on July 16, 2003. Id. ¶ 82, 102; DD-2, DD-4. That same day, on July 16, 2003, CitiMortgage filed suit against Acosta in the case styled CitiMortgage, Inc. v. David Acosta et al., 03-CA-1766-14-10, in the Circuit Court of the 18th Judicial Circuit, in and for Seminole County, Florida. Id . Ex. DD-17. Ten months after CitiMortgage's initiation of foreclosure proceedings against Acosta in state court, Acosta filed suit in this Court on May 21, 2004. Doc. No. 1. Plaintiff initially alleged violations of the federal Fair Debt Collection Practices Act against the Law Office and eventually sued other parties involved in the original mortgage transaction, alleging RICO and state claims. Doc. Nos. 1, 103.

FN6. Acosta does not elaborate on what triggered his suspicions, what it was that he believed was wrong, or how his suspicions justified discontinuance of payments due under the mortgage.

*3 Although this suit is completely separate from the foreclosure suit against Acosta, according to Defendants' counsel, Acosta has managed to stall the foreclosure for more than two years by referring to this case in the state court. Acosta's FDCPA claim against the Law Office for failing to report the debt as disputed or failing to provide adequate verification (if that is even necessary) are the only remaining claims in this court and have no bearing whatsoever on the foreclosure suit, which should proceed without reference to this litigation.

II. PROCEDURAL BACKGROUND

Acosta filed suit in this Court on May 21, 2004, against the law firm and lawyers collecting on the mortgage, Defendants Marie D. Campbell, Gregg Dreilinger, and the Law Offices of David J. Stern, P .A. (collectively the "Law Office"), alleging violations of the federal Fair Debt Collection Practices Act, 15 U.S.C. § 1692. Doc. No. 1. The Law Office filed a Motion to Dismiss on June 10, 2004 (Doc. No. 8), which was denied without prejudice. Doc. No. 17. The Law Office filed an Amended Motion to Dismiss on August 24, 2004. Doc. No. 21. Acosta moved to amend his Complaint (Doc. No. 24, 31), which was granted on November 16, 2004. Acosta filed his First Amended Complaint (Doc. No. 37) against the Law Office on November 30, 2004. The Law Office moved to dismiss Acosta's First Amended Complaint. Doc. No. 35. Acosta was granted further leave to amend, and on May 19, 2005, Acosta added claims against

CitiMortgage in the Second Amended Complaint, and the Defendants moved to dismiss. Doc. Nos. 65, 71. Acosta moved for leave to file his fourth set of allegations on June 20, 2005--more than one year after suit was filed and two years after the foreclosure began. Doc. No. 73. At a court-ordered status conference on August 3, 2005, the Court allowed Acosta one final opportunity to amend his complaint. Doc. No. 100.

Acosta's Third Amended Complaint alleges claims against the Law Office and the First Mortgage holders, CitiMortgage, Inc., and Citibank, FSB, for violations of the federal Racketeer Influenced And Corrupt Organizations Act, 18 U.S.C. § § 1961, and its Florida counterpart, Fla. Stat. § 772.101, as well as the Florida Consumer Collection Practices Act, Fla. Stat. § 559, and the Florida Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. § 501.202. Doc. No. 103. Acosta also alleges claims against several others involved in obtaining or assigning the mortgage who have only recently been served, i.e., Mortgage Capital Associates, Inc., Residential Funding Corporation, Jay M. Steren, Imelda W. Lay. Doc. No. 103. The Law Office, CitiMortgage, and Citibank move to dismiss the Third Amended Complaint. Doc. Nos. 94, 95, 116.

III. LEGAL ANALYSIS

A. Motion to Dismiss Standard

A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that Plaintiff can prove no set of facts that would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957); Harper v. Blockbuster

Entertainment Corp., 139 F.3d 1385, 1387 (11th Cir.1998). A trial court, in ruling on a motion to dismiss, is required to view the complaint in the light most favorable to the Plaintiff. Beck v. Deloitte & Touche, 144 F.3d 732, 735 (11th Cir.1998). The Court is also limited to examining the four corners of the complaint. Rickman v. Precisionaire, Inc., 902 F.Supp. 232, 233 (M.D.Fla.1995).

*4 Acosta is proceeding pro se; as such, he contends that he should be held to a more relaxed standard in evaluating the allegations in his pleadings. A complaint submitted by a pro se plaintiff should be held to a less stringent standard than that submitted by an attorney, and should be construed as alleging all fairly and reasonably inferred claims. See, e.g. Haines v. Kerner, 404 U.S. 519, 520, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972); Hughes v. Rowe, 449 U.S. 5, 9, 101 S.Ct. 173, 66 L.Ed.2d 163 (1980) (pro se plaintiff should not be held "to strict accountability of compliance with the rules of procedure"). However, even a pro se litigant must allege the essential elements of the claims for relief, and vague and conclusory allegations are insufficient to state a claim. Richards v. Harder, 864 F.2d 85, 87 (9th Cir.1988); Hales v. City of Montgomery, 347 F.Supp.2d 1167, 1171 (M.D.Ala.2004); Harsman v. Hood, No. 5:04cv480-Oc-10GRJ, 2005 WL 1228794, *3 (M.D.Fla. May 24, 2005) (pro se plaintiffs are expected to at least abide by the minimal pleading standards set forth by F.R. Civ. P. 8(a)). Courts have consistently refused to supply essential elements of a claim for a pro se plaintiff if these facts are not initially pleaded in the complaint. See, e.g., Harris v. Evans, 20 F.3d 1118 (11th Cir.1994) (refusing to supply allegations

necessary to establish standing for pro se plaintiff); Soffer v. City of Costa Mesa, 798 F.2d 361, 363) (9th Cir.1986) (dismissing because pro se plaintiff did not allege constitutional defects in 42 U.S .C. § 1983 suit and court would not supply essential allegations).

CitiMortgage, Citibank, and the Law Office seek to dismiss Acosta's Third Amended Complaint. The Law Office contends that Acosta fails to set forth an adequate factual basis for his claims and merely asserts conclusory allegations without sufficient support, including those supporting jurisdiction of this Court. The Law Office also contends that certain RICO counts were filed beyond the applicable statute of limitations. CitiMortgage and Citibank contend that all of Acosta's claims are subject to dismissal for failure to state a claim. Acosta contends that his claims withstand the motion to dismiss or in the alternative, he should be given another opportunity to amend his operative Complaint (and assert what would be his fifth version) to cure any deficiencies.

Because the allegations against Citibank are identical in all but one respect to Acosta's claims against CitiMortgage, Citibank adopted and joined in the reasoning and legal authorities in CitiMortgage's Motion to Dismiss. See Doc. No. 116. Beyond the agency or co-conspiracy theories that Citibank exercises control over CitiMortgage and is therefore vicariously liable, the only allegation specifically against Citibank is that Citibank's involvement was necessary to turn the value of the Promissory Note from "written form into a unit of money by depositing or otherwise crediting a bank account with the full value of the note." This argument will be addressed individually; in all other respects, Acosta relies on the arguments made in his prior Response to

CitiMortgage, Inc. (see Doc. No. 128) and Citibank and CitiMortgage's arguments will be addressed collectively as "CitiMortgage's" arguments.

IV. RICO CLAIMS

*5 CitiMortgage and the Law Office seek dismissal of Acosta's RICO claims [FN7] against them arguing that Acosta fails to allege facts with the requisite specificity required for RICO and fraud claims. They argue Acosta fails to allege sufficient facts of an "enterprise," a "pattern" of racketeering activity, or the identity of the persons who made misrepresentations in order to satisfy the RICO statutes. Acosta responds with citation to various paragraphs in his Third Amended Complaint, but with no significant analysis. See Doc. Nos. 110 at 4-5; 111 at 4-5. He also contends, without citation to any authority, that the delayed discovery rule should apply to his claims. See Doc. No. 111 at 3. In order to establish a federal civil RICO violation under § 1962(c), a plaintiff "must satisfy four elements of proof: '(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." ' Williams v. Mohawk Ind., Inc., 411 F.3d 1252, 1256 (11th Cir.2005) (quoting Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 (1985)). These requirements apply whether the RICO claim is civil or criminal in nature. Williams, 411 F.3d at 1256. In addition, civil RICO claimants must also show (1) the requisite injury to "business or property," and (2) that such injury was "by reason of" the substantive RICO violation. See id. (citing 18 U.S.C. § 1964(c)).

FN7. The Florida Civil Remedies for Criminal Practices Act, Fla. Stat. § 772 et seq., sometimes

referred to as the "Florida RICO" statute, was patterned after the Federal RICO Act and Florida courts often look to Federal RICO decisions for guidance in interpreting and applying the Act. Florida Software Systems, Inc. v. Columbia HCA Healthcare Corp., 46 F.Supp.2d 1276 (M.D.Fla.1999). The analysis applied to claims under the Federal RICO Act is equally applicable to claims under Florida's RICO statute. Jackson v. BellSouth Communications, 372 F.3d 1250 (11th Cir.2004).

CitiMortgage contends Acosta has not pled specific facts indicating agreement on the part of CitiMortgage to violate state law or otherwise engage in a "conspiracy" to violate RICO. The Law Office contends that Acosta fails to allege sufficient facts to establish that the Law Office was associated with an enterprise that affected interstate or foreign commerce, or that it participated in conduct of the enterprise's affairs, or that the participation was through a pattern of racketeering activity.

Plaintiff responds that he has alleged with sufficient particularity how the Law Office and CitiMortgage have collected "unlawful debts" through the mail, telephone and state court judicial proceedings. Acosta contends that the facts set forth in his Third Amended Complaint establish with the requisite particularity the entities forming an enterprise (¶ ¶ 5-15); the conspiracy among the entities (¶ ¶ 26-28); and "in furtherance of the scheme": (a) MCA and CitiMortgage's use of specific documents to make the transaction appear as though a Florida transaction when it was in fact an "unlawful Pennsylvania transaction" (¶ ¶ 31-32), and CitiMortgage's direction to MCA of which documents to use; (b) MCA's representation that the

documents were executed in Seminole County; and (c) the usurious charging of interest on the First Mortgage because of the way Citibank chose to fund the money lent to Acosta to purchase the Property (¶ 60-61).

Enterprise

To satisfy the first two elements of the four-part test under § 1962(c), Acosta must allege "conduct of an enterprise" and that the enterprise had a common goal. Williams v. Mohawk Industries, Inc., 411 F.3d 1252, 1257 (11th 2005) (citing United States v. Turkette, 452 U.S. 576, 583, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981) ("The enterprise is an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct.")). An enterprise "includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S .C. § 1961(4). As the Eleventh Circuit outlines in Williams:

*6 [T]he existence of an enterprise is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit. The definitive factor in determining the existence of a RICO enterprise is the existence of an association of individual entities, however loose or informal, that furnishes a vehicle for the commission of two or more predicate crimes, that is, the pattern of racketeering activity requisite to the RICO violation.

Williams, 411 F.3d at 1257-58 (citing United States v. Goldin Indus., Inc., 219 F.3d 1271, 1275 (11th Cir.2000)). The Law Office and CitiMortgage must have participated in "the operation or management of the enterprise itself." Williams, 411 F.3d at 1257 (citing Reves v. Ernst & Young, 507 U.S. 170, 185, 113 S.Ct. 1163, 122 L.Ed.2d 525 (1993)).

Without elaboration, Acosta points to Paragraphs 5-15 of his Third Amended Complaint as sufficient to support his "enterprise" allegations. However, the pertinent paragraphs he cites are merely jurisdictional allegations and do not describe an enterprise at all for the Law Office or Defendants Campbell and Dreilinger. For the Law Office, Acosta alleges nothing more than the Law Office is a Florida company engaged in the business of collecting debts and Defendants Campbell and Dreilinger are employed as debt collectors. Doc. No. 103 ¶ 5-6. Acosta alleges in a conclusory fashion that Dreilinger, Campbell, the Law Office and CitiMortgage have "engaged in a pattern of racketeering in violation of federal and state laws ... as part of an enterprise working to collect an unlawful debt." Doc. No. 103 ¶ 20. Such allegations clearly fail to allege the Law Office's, Campbell's or Dreilinger's involvement in any enterprise whatsoever.

As to CitiMortgage, Acosta alleges simply that, because it is a corporation, it qualifies as "an enterprise as defined under 18 U.S .C. § 1961(4)." Doc. No. 103 ¶ 8. Case law is quite clear that the RICO defendant must be distinct from the alleged enterprise. "The court has consistently insisted that the RICO defendant or person be separate and

distinct from the enterprise ... because liability depends on showing that the defendants conducted or participated in the conduct of the enterprise's affairs, not just their own affairs." Stachon v. United Consumer Club, Inc., 229 F.3d 673, 676 n. 3 (7th Cir.2000) (citing Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 163, 121 S.Ct. 2087, 150 L.Ed.2d 198 (2001)). In this case, Acosta alleges no more than that MCA found an investor, CitiMortgage/Citibank, who lent him the money to purchase his residence in Florida; that MCA assigned his mortgage to CitiMortgage/Citibank; and MCA required Acosta to sign a substitute Florida-compliant promissory note to replace the original multi-state note that MCA had initially required. These are precisely the sort of activities that MCA and CitiMortgage/Citibank regularly engage in for the purpose of originating, settling, and investing in mortgages; they are not enterprise activities separate and apart from their regular business activities. See Rivera v. AT & T Corp., 141 F.Supp.2d 719, 725-26 (S.D.Tex.2001) (where Plaintiffs alleged that three national corporations each constituted an enterprise within the meaning of 18 U.S.C. § 1961(4), such general allegation failed the strict pleading requirements under RICO because no facts suggested the companies existed as an entity apart from their business of providing cable services), aff'd, 34 Fed. Appx. 962 (5th Cir.2002).

*7 The usurious loan claim against Citibank (and other Defendants as co-conspirators) is that Citibank's involvement was necessary to turn the value of the Promissory Note from "written form into a unit of money by depositing or otherwise crediting a bank account with the full value of the note"

because only banks are authorized to treat the promissory note as a deposit against which they can lend out funds. Doc. No. 103 ¶ 55-66. This "banking mechanism" is a basic principle of macroeconomics, the multiplier effect, which allows financial institutions to hold only a fractional reserve of the total amount of deposits and lend out the remaining portion. See generally Ivan Johnson and William Roberts, MONEY AND BANKING: A MARKET ORIENTED APPROACH at 257-313 (2nd ed.1985). Again, taking a deposit (even as a promissory note), assuming the risk of non-payment by the maker of the note, and lending money against the note as a deposit are all activities that Citibank regularly engages in; thus, they cannot support an distinct "enterprise" as required under RICO. See Rivera, 141 F.Supp.2d at 725-26.

Even if the Court were to construe Acosta's claims to allege that CitiMortgage, the Law Office, and MCA together constitute a RICO enterprise, it will not save the RICO claims from dismissal. Acosta must demonstrate an "association in fact" which requires "evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." United States v. Turkette, 452 U.S. 576, 583, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981); Atkinson v. Anadarko Bank & Trust, Co., 808 F.2d 438, 440-41 (5th Cir.1987). Acosta would also need to "plead specific facts which establish that the association exists for purposes other than simply to commit the predicate acts." Elliott v. Foufas, 867 F.2d 877, 881 (5th Cir.1989). Acosta's allegations are to the contrary--that the associations between CitiMortgage/Citibank and MCA exist merely for the purpose of funding

mortgages and the association between CitiMortgage/Citibank and the Law Office existed for the purpose of foreclosing the mortgage. Acosta's RICO claims would fail on this basis alone.

Racketeering activity

Acosta alleges three "crimes" committed by MCA and, as a conspirator, by CitMortgage/Citibank, as racketeering activities in support of his RICO claims. First, Acosta alleges that MCA operated as an unlicensed lender transacting a mortgage in Pennsylvania, a third degree felony, with CitiMortgage "conspiring" and "aiding" MCA in transacting the mortgage loan. Id. ¶ 25-26, Ex. DD-32. Second, Acosta contends that MCA made usurious loans by inducing Acosta to execute two promissory notes for the same debt. Doc. No. 103 ¶ ¶ 38-40, Ex. DD-33 & 34. Third, Acosta alleges that MCA falsely represented the Assignment of Mortgage was executed in Seminole County and this representation created a defective jurat, a crime in Florida. Id. at ¶ 32-33, Ex. DD-8. Acosta's alleged "predicate offenses" fail to meet the requirements of the RICO statute, and fail to state a claim under any set of facts.

*8 "Racketeering activity" is defined in 18 U.S.C. § 1961(1)(A) in terms of a list of state and federal crimes: "any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year." 18 U.S.C. § 1961(1)(A). [FN8] The individual acts of racketeering activity are usually described as the "predicate acts." "A 'pattern' of racketeering

activity is shown when a racketeer commits at least two distinct but related predicate acts." ' Williams v. Mohawk Industries, Inc., 411 F.3d 1252, 1256-57 (11th Cir.2005); Maiz v. Virani, 253 F.3d 641, 671 (11th Cir.2001); Cox v. Administrator U.S. Steel & Carnegie, 17 F.3d 1386, 1397 (11th Cir.), modified on other grounds by 30 F.3d 1347 (11th Cir.1994). The state law felony offenses listed in § 1961(1)(A) are included by generic designation, and the test for determining whether particular acts fit into the generic category of predicate offenses is whether the complaint alleges the type of activity generally known or characterized in the proscribed category. See United States v. Forsythe, 560 F.2d 1127, 1137 (3d Cir.1977) (citing United States v. Nardello, 393 U.S. 286, 295, 89 S.Ct. 534, 21 L.Ed.2d 487 (1969)).

FN8. The other provisions of § 1961(1) setting forth "racketeering activity" cite federal criminal statutes and are clearly inapplicable to the facts of this case. See 18 U.S.C. § 1961(1)(B)-(G).

Any act that does not fall within the purview of RICO's definition of predicate offenses is not an act of "racketeering activity." Bonton v. Archer Chrysler Plymouth, Inc., 889 F.Supp. 995, 1001-02 (S.D.Tex.1995); United States v. Private Sanitation Indus. Ass'n of Nassau/Suffolk, Inc., 793 F.Supp. 1114, 1136 (E.D.N.Y.1992). RICO forbids "racketeering," and not state offenses per se; the state offenses referred to are definitional only, and racketeering, the federal crime, is defined by reference to state law crimes. United States v. Frumento, 563 F.2d 1083 (3rd Cir.1977). Performing transactions as an unlicensed mortgage lender, providing a defective jurat, or usury, are not listed in 18 U.S.C. § 1961(1)(A) and therefore do not

constitute a RICO predicate act. Therefore, Acosta's claims fail to support a RICO claim on that basis alone.

However, under the right set of facts, usury may qualify under 18 U.S.C. § 1961(6) as collection of an "unlawful" debt. Title 18 United States Code, section 1961(6) defines an "unlawful debt" as one "which is unenforceable under State of Federal law in whole or in part as to principle or interest because of the laws relating to usury, and "which was incurred in connection with ... the business of lending money or thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate." 18 U.S.C. § 1961(6); see Rivera v. AT & T Corp. ., 141 F.Supp.2d 719, 725 (S.D.Tex.2001) (where "administrative fees" alleged by RICO plaintiff did not qualify as interest or violate the Texas usury statute, they could not claim that defendants committed the predicate illegal act sufficient to sustain a RICO claim), aff'd, 34 Fed. Appx. 962 (5th Cir.2002); Lovick v. Ritemoney Ltd., 378 F.3d 433, 440 (5th Cir.2004) (broker's fee for services could not be attributed to interest to assess usury claim to support RICO claim).

*9 Acosta's claims regarding the usurious loan transaction are without merit. Doc. No. 103 ¶ 41-53. Acosta alleges that CitiMortgage/Citibank and MCA conspired to obtain two promissory notes from him allegedly to induce him to pay "multiple times." He alleges that he "may have an obligation under the previously signed promissory note to some unknown entity who could make a claim against [him] at any

time." Doc. No. 103 ¶ 50. However, when asked by the Court at oral argument if any entity has sought to enforce the previously-signed promissory note against him, Acosta admitted that it had not happened. Acosta also alleges that the "promissory note subject of this dispute has been satisfied in full with the source of value of the original promissory note that was ... never returned to" him. Id. ¶ 52. That argument is frivolous. The second promissory note was a substitute for the original promissory note--the only way to satisfy the debt owed under the substitute note is through payments from Acosta.

Even if Acosta could state a RICO claim for usury as a potential "predicate act," it would be a single qualifying "predicate act" and therefore would fail to meet the requirement that there be at least two predicate acts to support a RICO claim. To plead a pattern of racketeering activity sufficient to withstand dismissal, a plaintiff must charge that: (1) the defendants committed two or more predicate acts within a ten year time span; (2) the predicate acts were related to one another; and (3) the predicate acts demonstrated criminal conduct of a continuing nature. H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 239-43, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989) (emphasis added); Ubuy Holdings, Inc. v. Gladstone, 340 F.Supp.2d 1343, 1348-49 (S.D.Fla.2004) (quoting Jackson v. BellSouth Telecommunications, 372 F.3d 1250, 1264 (11th Cir.2004). Acosta alleges no more than that he "believes that [defendants] ... continue to pose threats to continued criminal activity ... and other customers, in Pennsylvania, or elsewhere, have been subjected to the same unlawful conduct." Doc. 103, ¶

75. While a plaintiff may establish the third element of "continuing nature" by showing that the racketeering acts themselves include a specific threat of repetition extending indefinitely into the future, see Ubuy Holdings at 1349, Acosta's unsupported and vague allegations are insufficient.

Even if performing transactions as an unlicensed lender in Pennsylvania were a predicate act, the allegations underlying the RICO claims would not state a claim upon which relief can be granted. The undisputed language of the First Mortgage states that Florida law will govern. "This Security Instrument shall be governed by federal law and the law of the jurisdiction in which the Property is located," i.e., Florida. Doc. No. 103-4, Ex. DD-7 ¶ 15 (emphasis added). Florida law is clear that, in an interstate commercial loan transaction with which several states have contacts, Florida courts enforce the choice of law provision provided by the parties so long as the jurisdiction chosen in the contract has a rational relationship with the transaction. Continental Mortg. Investors v. Sailboat Key, Inc., 395 So.2d 507, 508 (Fla.1981) (recognizing Massachusetts choice of law provision in contract on Florida property); Atlas Subsidiaries of Fla., Inc. v. O. & O. Inc. ., 166 So.2d 458, 461 (Fla. 1st DCA 1964) (Florida law applied where choice of law provision in promissory note specifically selected Florida law); Your Const. Center, Inc. v. Dominion Mort. & Realty Trust, 402 F.Supp. 757, 760 (S.D.Fla.1975) (New York choice of law provision in mortgage documents would apply). In Florida, a choice of law provision in a contract is presumed valid until it is proved invalid; the party who seeks to prove such a provision invalid bears the burden of proof. Mazzoni

Farms, Inc. v. E.I. DuPont De Nemours and Co., 761 So.2d 306, 311 (Fla.2000) (citing Delhomme Indus., Inc. v. Houston Beechcraft, Inc., 669 F.2d 1049, 1058 (5th Cir.1982)). Acosta has not argued that the choice of law provision in the Mortgage should be invalid for any reason; therefore, it applies and Florida law governs this case. Having found that Florida law governs the First Mortgage, Acosta's allegations that MCA operated as an unlicensed lender transacting mortgages in Pennsylvania (Doc. No. 103 ¶ 25) and that CitiMortgage or Citibank conspired in such transactions (id. ¶ 26), are without merit and cannot support his RICO claims.

*10 The allegations that MCA, through Imelda May, "falsely represented" that the Assignment of Mortgage document was executed in Seminole County, also do not support a RICO claim. Id. at ¶ 32-33. The Assignment of Mortgage form at issue has "STATE OF FLORIDA, COUNTY OF SEMINOLE" typed in below witness Steven Powell's name. However, the notarization [FN9] is actually of Jay Steren's signature as Corporate Secretary for MCA, which took place in California, not Florida. Below Imelda May's signature, is her notary stamp which very clearly states her commission number and "Notary Public-California, Los Angeles, County." Doc. No. 103, Ex. DD-8. Mr. Steren signed the document in California, and his signature was notarized in California. On the face of the document there is no false jurat. Obviously, Ms. Lay intended to act as a notary under the authority of the state of California, as her stamp clearly indicated. Id. The fact that the Assignment of Mortgage transferred real property located in Seminole County and took effect in Seminole County does not have any impact

on Ms. Lay's notarization of Mr. Steren's signature. Acosta's allegations regarding Ms. Lay's jurat are without merit and cannot support his RICO claims.

FN9. The notarization states: "The foregoing instrument was acknowledged before me this 24th day of March by Jay M. Steren as Corporate Secretary for Mortgage Capital Assoc. Signature--Imelda May." Doc. No. 103, Ex. DD-8.

Conspiracy

To allege a conspiracy claim under RICO, a plaintiff must allege "(1) that each defendant agreed to maintain an interest in or control of an enterprise or to participate in an enterprise through a pattern of racketeering activity and (2) that each defendant further agreed that someone would commit at least two predicate acts to accomplish those goals." Goren v. New Vision International, Inc., 156 F.3d 721, 732 (7th Cir.1998). A RICO conspiracy plaintiff must allege injury from an act that is analogous to an "ac[t] of a tortious character," meaning an act that is independently wrongful under RICO. Beck v. Prupis, 529 U.S. 494, 505-06, 120 S.Ct. 1608, 146 L.Ed.2d 561 (2000) (citing 4 Restatement (Second) of Torts § 876, Comment b) (affirming Beck v. Prupis, 162 F.3d 1090, 1098 (11th Cir.1998)); Lockheed Martin Corp. v. Boeing Co., 314 F.Supp.2d 1198, 1217 n. 13 (M.D.Fla.2004). Because the Court has determined that Acosta fails to state a claim for any wrongful act under RICO by any of the alleged co-conspirators, Acosta's conspiracy claim must also fail.

RICO injury

Acosta also has failed to set forth a valid RICO claim because he has not alleged the injury required to sustain a cause of action under RICO. Plaintiffs

seeking the civil remedy of treble damages must satisfy the requirements of 18 U.S.C. § 1964(c), which requires (1) the requisite injury to "business or property" by violation of § 1962 and (2) that such injury was "by reason of" the substantive RICO violation. See Williams, 411 F.3d at 1256. Title 18 U.S.C. § 1962(a) states:

> It shall be unlawful for any person who has received any income derived, directly or indirectly, ... through the collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

*11 Courts have interpreted this statute to require that "the compensable injury stem from the violation of the RICO section in question, so any injury under § 1962(a) must flow from the use or investment of racketeering income." Parker & Parsley Petroleum Company v. Dresser Industries, 972 F.2d 580, 584 (5th Cir.1992); see also Nolen v. Nucentrix Broadband Networks, Inc., 293 F.3d 926, 929-30 (5th Cir.2002) (damages must arise from the use or investment of money received as a result of such activities in a racketeering enterprise). Acosta alleges injury from his payment of an unlawful debt to Defendants, not from Defendants' investment of any unlawful debt income; thus, Acosta has failed to plead a cognizable claim under section § 1962(a). See, e.g., Rivera v. AT & T Corp., 141 F.Supp.2d 719, 726-27 (S.D.Tex.2001) (RICO plaintiffs failed to state

RICO claim where they alleged injury from their payments of "unlawful debt" rather than defendants' investment of the unlawful debt income), aff'd, 34 Fed. Appx. 962 (5th Cir.2002).

Statute of Limitations

In addition to the deficiencies in Acosta's RICO claims already discussed, CitiMortgage/Citibank and the Law Office move to dismiss because none of Acosta's claims were brought within the applicable statute of limitations. The applicable statute of limitations in RICO cases is four years. See Agency Holding Corp. v. Malley-Duff and Associates, Inc., 483 U.S. 143, 107 S.Ct. 2759, 97 L.Ed.2d 121 (1987). Knowledge of the injury, rather than knowledge of the pattern of RICO activity, starts the clock running for statute of limitations purposes. Rotella v. Wood, 528 U.S. 549, 555-56, 120 S.Ct. 1075, 145 L.Ed.2d 1047 (2000); Pacific Harbor Capital, Inc. v. Barnett Bank, N.A., 252 F.3d 1246, 1249 (11th Cir.2001) (rejecting equitable tolling claim on facts alleged by RICO plaintiff in light of Rotella).

Acosta alleges RICO claims arising out of events occurring in March and April 2000. Acosta first alleged RICO claims against CitiMortgage and the Law Office in his Third Amended Complaint filed on August 3, 2005; thus, his RICO claims are clearly barred by the four-year statute of limitations. Acosta argues that he is entitled to an exception from the statute of limitations because the "delayed discovery" rule should apply to his claims in that they "arose out of discovery of very recent evidence" and he has "acted with diligence to bring forth his claims." Doc. No. 111 at 3. Assuming arguendo that a "delayed discovery rule" of some sort could apply in a RICO

action, it would not apply to the facts alleged by Acosta because he knew of his "injuries"--the alleged false jurat, usury, and unlicensed mortgage lending--in 2000 when he signed the documents at issue. The Assignment of Mortgage was executed in 2000 and he knew at that time that CitiMortgage had taken over his First Mortgage. He also knew in 2000 that he was required to provide the substitute First Mortgage, per the letter from Imelda Lay. The fact that Acosta did not realize the allegedly RICO aspects of the documents does not provide a basis for assertion of a "delayed discovery" defense five years later. See Rotella v. Wood, 528 U.S. 549, 555- 56, 120 S.Ct. 1075, 145 L.Ed.2d 1047 (2000) (accrual of patient's RICO action was not delayed until he discovered alleged pattern of racketeering activity, but triggered at time of injury); Hargraves v. Capital City Mortgage Corp., 140 F.Supp.2d 7, 16-17 (D.D.Cir.2000) ("fraudulent concealment" delayed-discovery rule did not apply to toll statute of limitations applicable to borrowers' RICO claim, although borrowers alleged that they were not aware of mortgage company's alleged racketeering activity, where borrowers did not suggest any particular effort by mortgage company to hide its alleged wrongdoing, and borrowers should have been aware that they were injured by the allegedly illegal and discriminatory loans), modified on other grounds, 147 F.Supp.2d 1 (D.C.Cir.2001). Acosta's RICO claims are due to be dismissed (alternatively) on statute of limitations grounds.

Immunity

*12 The Law Office contends its activities occurred during the course of litigation in the foreclosure action and it is entitled to absolute

immunity from Acosta's RICO claims under Florida's litigation privilege, citing Spitalny v. Insurers Unlimited, Inc., No. 2:05cv12FTM-29SPC, 2005 WL 1528629 (M.D.Fla. June 24, 2005). Acosta responds that the privilege provides immunity only for conduct during judicial proceedings and not for acts outside of those proceedings. Florida's litigation privilege affords absolute immunity for acts occurring during the course of judicial proceedings. Jackson v. BellSouth Telecomms., 372 F.3d 1250, 1274 (11th Cir.2004). Florida's litigation privilege applies to the state-law tort claims adjudicated in federal court. Id. at 1275. The privilege initially developed to protect litigants and attorneys from liability for acts of defamation, but has since been extended to cover all acts related to and occurring within judicial proceedings, and would most likely include events taking place outside the courtroom during discovery. Id. at 1276. While the Florida litigation privilege clearly applies as a defense to state tort claims, see Jackson, 372 F.3d at 1276, it is not clear that the Florida litigation privilege applies to RICO or other statutory claims in the Eleventh Circuit. See Florida Evergreen Foliage v. E .I. Dupont De Nemours, 336 F.Supp.2d 1239, 1267 (S.D.Fla.2004) (there is no controlling case applying the Florida litigation privilege to RICO claims). The parties have not adequately briefed the matter for the Court to resolve the issue of whether the litigation privilege applies to RICO claims, one of first impression in this circuit, at the motion to dismiss stage.

V. FDCPA, FCCPA (COUNTS III AND IV)

CitiMortgage and the Law Office seek dismissal of Acosta's FDCPA claims, and his claims under the parallel Florida statute, the Florida

Consumer Credit Protection Act, for failure to state a claim upon which relief can be granted. [FN10] Acosta alleges that CitiMortgage/Citibank and the Law Office violated the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 by failing to communicate that his debt was disputed, by repeatedly failing to disclose that communications were from a debt collector, by serving Acosta with a summons in an improper manner and time, and by improperly filing the foreclosure action. Doc. No. 103 ¶ 133.

FN10. Acosta's allegations of Defendants' violations of the FCCPA are virtually identical to his allegations of violations of the FDCPA. Compare Doc. No. 103 ¶ 133 & ¶ 153.

Congress enacted the Federal Debt Collection Practices Act "to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses." 15 U.S.C. § 1692(e). The FDCPA prohibits unfair or unconscionable collection methods, conduct which harasses, oppresses or abuses any debtor, and the making of any false, misleading, or deceptive statements in connection with a debt, and it requires that collectors make certain disclosures. 15 U.S.C. § § 1692d, 1692e, 1692f. The FDCPA applies to "debt collectors," defined as "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, [FN11] or who regularly

collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. § 1692a(6).

FN11. The Federal Debt Collection Practices Act defines "debt" as "any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment." 15 U.S.C. § 1692a(5).

*13 Title 15 U.S.C. § 1692e generally prohibits the use of any false, deceptive, or misleading representations or means to collect a debt. 15 U.S.C. § 1692e. Acosta alleges that Defendants violated § 1692c and 1692e by failing to communicate to credit reporting agencies and others that his debt was disputed; by repeatedly failing to disclose that their communications sent to Acosta were from a debt collector and information obtained would be used for that purpose; and by communicating with a third-party information about the debt without Acosta's consent. Doc. No. 103 ¶ ¶ 133(a), (b), (c). Section 1692e(8) prohibits communications to any person "credit information which is known or should be known to be false, including the failure to communicate that a disputed debt is disputed." 15 U.S.C. § 1692e(8).

On July 14, 2003, Acosta sent a notice of dispute and debt verification request to the Law Office. Doc. No. 103 ¶ 82. On the same day that the verification request was received, July 16, 2003, the Law Office filed the foreclosure suit against Acosta.

Doc. No. 103 DD-7. On August 12, 2003, Acosta filed an answer and sent a letter to the Law Office asserting his rights under the FDCPA. Id. ¶ 100. On October 2, 2003, the Law Office sent a letter with information about Acosta's debt to Marshall C. Watson, P.A. Id. ¶ 121, Ex. DD24. Acosta alleges that he has checked with at least three credit reporting agencies and the Law Office and CitiMortgage/Citibank have not disclosed to the credit reporting agencies that Acosta is disputing the debt at issue. Id. ¶ 122. Defendants contend that pursuant to § 1692c(b), communications to consumer reporting agencies are not included under 15 USC § 1692e(8). Acosta claims there is no specific exemption in this section for credit reporting agencies.

Under FDCPA provisions governing communications "in connection with debt collection," debt collectors may not communicate with third-parties about the debt without Acosta's consent, except that a debt collector may communicate with a consumer reporting agency if otherwise permitted by law. 15 U.S.C. § 1692c(b). However, "[t]he FDCPA does not prohibit a debt collector from communicating to agencies, and a communication, in and of itself, to a consumer reporting agency, does not support a cause of action under the FDCPA ." See In re Creditrust Corp., 283 B.R. 826, 832 (Bkrtcy.D.Md.2002) (citing 15 U.S.C. § 1692(c)(b)).

Communications with consumer reporting agencies is "otherwise permitted by law" as specifically set forth in the Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq. Section 1681s-2(a)

regulates the responsibilities of furnishers of information, like CitiMortgage, to consumer reporting agencies to provide accurate information including notice of a consumer's dispute. [FN12] 15 U.S.C. § 1681s-2(a). Acosta cannot state a claim under this portion of the FCRA because there is no private right of action to enforce the obligations established by § 1681s-2(a); those obligations must be enforced by federal and state officials. Nelson v. Chase Manhattan Mortgage Corp., 282 F.3d 1057, 1059 (9th Cir.2002) (private enforcement under § § n & o is excluded); see also Redhead v. Winston & Winston P.C., No. 01 Civ. 11475, 2002 WL 31106934, *4 (S .D. N.Y. Sept. 20, 2002).

FN12. Although Acosta could bring a private action under § 1681s-2(b), which imposes additional duties once the furnisher of information receives notice of the consumer's dispute from a credit reporting agency, he has not alleged that he contacted the credit reporting agencies to dispute the foreclosure, or that the credit reporting agencies notified CitiMortgage that Acosta was disputing the debt.

*14 However, a debt collector may be liable under the FDCPA if it fails to communicate to a consumer reporting agency that a debt is disputed. See Ryan v. Wexler & Wexler, 113 F.3d 91, 92 (7th Cir.1997) (plaintiff stated a claim under the FDCPA for debt collector's failure to communicate to credit reporting agencies that his account was disputed); Semper v. JBC Legal Group, --- F.Supp.2d ----, 2005 WL 2172377, *3 (W.D.Wash. Sept.6, 2005) (debt collector's failure to communicate to credit bureau that dishonored check debt was disputed violated the statute). Whether Defendants failed to communicate

to credit reporting agencies that the debt was disputed, or they did communicate such information but the credit reporting agencies did not include the information, is a factual issue which may be resolved at a later stage in the litigation, but at this preliminary stage of the litigation, Acosta's claim under ¶ 133(a) survives dismissal.

Defendants' communication with the Law Offices of Marshall C. Watson, P.A., about the debt, done without Acosta's consent, may state a claim for violation of the FDCPA unless an exception applies. Defendants contend that this communication does not state a claim for violation of the FDCPA because it was a confidential payoff letter provided at the request of Watson, P.A., who is the attorney for another creditor, the second mortgage holder, involved in the foreclosure. Attorneys for creditors are excluded from application of the FDCPA, see 15 U.S.C. § 1692c(b). As a practical matter, in a state foreclosure action, the first and second mortgage holders and other creditors must be able to communicate regarding the balance or settlement of the outstanding mortgages. Acosta's claim under ¶ 133(c) is due to be dismissed.

Acosta also claims Defendants violated the FDCPA by repeatedly failing to disclose that their communications sent to Acosta were from a debt collector. Acosta alleges that motions and discovery documents were sent to him in the course of collecting the disputed debt without the required statutory notice to the consumer pursuant to 15 U.S.C. § 1692e(11). Pursuant to § 1692e, a debt collector must disclose in the initial written communication with the consumer that the debt collector is attempting to collect a debt. 15 U.S.C. §

1692e(11). As Defendants point out, only the initial communication must disclose it is from a debt collector and the debt collector is attempting to collect a debt. See id. After the initial communication, the debt collector need only state that the communication is from a debt collector.

Subsection 11 excepts "formal pleadings made in connection with a legal action" from the requirements. Acosta contends that "all motions, responses to motions, responses to discovery, notices, and other non-pleadings"--in other words, documents generated in the foreclosure litigation--should have indicated they were generated by a debt collector. Once the initial pleading in the foreclosure lawsuit was filed, Acosta had ample notice that the foreclosure was instigated by the debt collecting law firm. Regardless of the technical definition of "pleading" in other contexts, the purpose of this exception is plain. Acosta's claim under ¶ 133(b) is due to be dismissed.

*15 Acosta contends that Defendants violated § 1692g and 1692c by failing to provide verification of the debt as required by federal law and by failing to cease collection activities prior to providing the verification; by continuing debt collection efforts after Acosta had disputed the debt in writing pursuant to § 1692g debt validation rights; by serving him with a summons in a manner that "overshadowed the notice of validation rights which would create confusion for a least sophisticated consumer about his rights" because the notice was found on page nine of the summons and complaint;

and by serving him at 7:20 a.m., a time allegedly disallowed. Doc. No. 103 ¶ ¶ 133(d), (e), (f).

On July 14, 2003, Acosta sent a "Notice of Dispute and Debt Validation Request" seeking verification of the alleged debt to the Law Office; it was delivered on July 16, 2003. Doc. No. 103 ¶ 82; Ex. DD-2 (certificate of service); DD-7. The Law Office filed the foreclosure suit against Acosta on July 16, 2003, the very same day. Id. ¶ 84. Acosta contends that Defendants failed to provide verification of the debt as required by the FDCPA and failed to cease collection activities prior to providing the verification. Defendants contend that Acosta's letter mailed on July 14, 2003 did not trigger an obligation to verify the debt under § 1692g(b). Doc. No. 103, Ex. DD-2. Under § 1692g(b), "[i]f the consumer notifies the debt collector in writing within the thirty-day period [of the initial communication] that the debt ... is disputed ... the debt collector shall cease collection of the debt ... until the debt collector obtains verification of the debt or a copy of a judgment ... and a copy ... is mailed to the consumer." 15 U.S.C. § 1692g(a) & (b).

The Law Office did not send Acosta an "initial communication" or information on disputing the debt prior to filing the foreclosure suit. However, the FDCPA does not impose on a debt collector the obligation to provide information regarding a dispute notice to a debtor prior to filing suit. Sprouse v. City Credits Co., 126 F.Supp.2d 1083, 1089 (S.D.Ohio 2000). Acosta contends that the foreclosure complaint (filed on July 16, 2003) constituted an initial communication and his July 16, 2003-delivered letter gave notice of the dispute. The Eleventh Circuit has held that a legal action, a

summons and complaint, does not constitute a "communication" in connection with collection of a debt under the FDCPA; thus, the Law Office was not required to wait thirty days before proceeding with the suit. See Vega v. McKay, 351 F.3d 1334, 1336-37 (11th Cir.2003) (discussing FTC commentary that states institution of formal legal action against a consumer is not a communication in connection with collection of any debt). By the same token, Acosta's claims that the notice on page nine of the summons [FN13] "overshadowed the notice of validation rights which would create confusion for a least sophisticated consumer about his rights" (§ 133(e)) and service of the summons at 7:20 a.m. (¶ 133(f)) violating the statute are without merit because the summons and complaint are not "initial communications" under the FDCPA. See id. On these points, the Motions to Dismiss are due to be granted.

FN13. Acosta relies on the holding of In re Martinez, 266 B.R. 523, 533 (Bankr.S.D.Fla.2001), aff'd, 311 F.3d 1272 (11th Cir.2002) for the proposition that the summons and complaint constitute and initial communication and the statutory notice on page nine violated the FDCPA. The Eleventh Circuit in Vega discussed Martinez and placed any such reading of that case in doubt. Vega v. McKay, 351 F.3d 1334, 1337 (11th Cir.2003).

*16 The only remaining issue under the FDCPA is whether Acosta's verification request which arrived on July 16, 2003 arrived in time to give notice to the Law Office that Acosta disputed the debt--so as to stay collection efforts--and postpone the filing of the foreclosure suit against Acosta, which was also filed on July 16, 2003. A debt collector is free to file suit when collecting on a debt

unless the debtor timely disputes the debt. See Shimek v. Weissman, Nowack, Curry & Wilco, P.C., 374 F.3d 1011, 1013 (11th Cir.2004) (a debt collector may file a lien before a consumer has made any request for verification); see also Sprouse v. City Credits Co., 126 F.Supp.2d 1083, 1089 (S.D.Ohio 2000); Bartlett v. Heibl, 128 F.3d 497, 501 (7th Cir.1997) ("The debt collector is perfectly free to sue within thirty days; he just must cease his efforts at collection during the interval between being asked for verification of the debt and mailing the verification to the debtor"). It is very possible that Acosta's dispute notice arrived on the same day after the foreclosure suit was filed and the Law Office was unaware of it before the suit was filed.

Read in the light most favorable to Acosta, he states a claim for violation of the FDCPA if the Law Office was aware of his dispute of the debt and request for verification and filed the lawsuit anyway or took other actions in furtherance of the litigation. See, e.g., Anderson v. Frederick J. Hanna & Associates, 361 F.Supp.2d 1379, 1383 (N.D.Ga.2005) (debt collector violated FDCPA when it filed a lawsuit after request for verification had been made); McDaniel v. South & Assoc., 325 F.Supp.2d 1210, 1218 (D.Kan.2004) (judicial foreclosure and suit against individual debtor filed one week after debt collector received request for verification and three weeks before it mailed verification information to debtor violated FDCPA).

However, a number of courts have held as a matter of law that foreclosing on a mortgage is not debt collection activity for purposes of the FDCPA.

Beadle v. Haughey, No. Civ.04-272-SM, 2005 WL 300060 (D.N.H. Feb.9, 2005) and cases cited therein ("it seems very well established that foreclosing on a mortgage does not constitute debt-collecting activity under the FDCPA"). "Security enforcement activities fall outside the scope of the FDCPA because they are not debt collection practices." Rosado v. Taylor, 324 F.Supp.2d 917, 924 (N.D.Ind.2004) (citing 15 U.S.C. § 1692a(6)). Because the parties did not brief the issue of whether foreclosure of a mortgage even constitutes debt collecting activity under the FDCPA--and if it does, which factual issues [FN14] remain--it is a matter that must be decided at the summary judgment or trial stage. To the extent the Motions to Dismiss seek dismissal of Acosta's claims in § 133(d), they are denied without prejudice to reassertion at the summary judgment stage.

FN14. The sufficiency of the verification that the Law Office provided, if such verification is even required in a foreclosure action, is also a factual issue to be decided at the summary judgment stage or at trial, not in considering a motion to dismiss.

Acosta contends that Defendants violated § 1692e by filing the foreclosure suit in the name of a party not entitled to sue him, i .e., parties without legal standing to foreclose; and by filing multiple pleadings in the foreclosure action containing misrepresentations of fact. Doc. No. 103 ¶ ¶ 133(g), (h), (i). Acosta misconstrues CitiMortgage's transfers of the mortgage and promissory note to the related entity Citibank as a violation of the FDCPA.

*17 Acosta contends that the initial foreclosure complaint identified the holder of the mortgage as

CitiMortgage, Inc. rather than its corporate parent entity, CitiBank, FSB, the then-holder of the mortgage note. Defendants contend that the holder of the mortgage at the time the foreclosure suit was filed was CitiMortgage, Inc. Doc. No. 103, Ex. DD-8, DD-17; Ex. B to Complaint to Foreclose Mortgage. Based on the allegations in the Third Amended Complaint and the documents incorporated therein, the Court agrees.

MCA was the original mortgage holder, who assigned the mortgage to "Citicorp Mortgage, Inc." [FN15] on March 24, 2000. Id. Ex. DD-8; ¶ 32. The Promissory Note was negotiated on the back of the Note as payable to the order of Citicorp Mortgage, Inc. Doc. No. 108, DD-20. At some point later, the Promissory Note was made payable to the order of Citibank, FSB (id.), but the First Mortgage remained in the name of Citicorp Mortgage, Inc. On July 16, 2003, CitiMortgage, Inc. filed the foreclosure suit against Acosta. Doc. No. 103, Ex. DD-17. The discrepancy came to the state court's attention, and it dismissed Citicorp Mortgage, Inc.'s original complaint because it had failed to "join an indispensable party, to wit: Citibank, FSB." Doc. No. 103, DD-19. The state court allowed CitiMortgage to file an amended complaint. Id. On September 7, 2004, CitiMortgage, Inc. f/k/a Citicorp Mortgage, Inc. rectified the discrepancy and assigned the First Mortgage to Citibank, FSB (id. Ex. DD-21 att.) and filed an Amended Complaint.

FN15. It is undisputed that CitiMortgage, Inc. was formerly known as Citicorp Mortgage, Inc.

Defendants' conduct in the foreclosure suit is not properly before this Court, since Acosta's remedy

for their alleged "misrepresentations" or standing to sue is properly before the state court hearing the foreclosure. Obviously, Acosta had an appropriate remedy in state court, because the court addressed the standing issue and dismissed the original foreclosure complaint for failure to join Citibank, FSB. Moreover, based on the facts as alleged by Acosta, he cannot state a claim for "a false representation of the character, amount, or legal status of any debt" because the First Mortgage was concededly held by CitiMortgage, Inc. f/k/a Citibank Mortgage, Inc., even if the corresponding Promissory Note was not (at that time). As such, CitiMortgage had standing to sue and the representations made were not false. See Orenbuch v. North Shore Health Systems, Inc., 250 F.Supp.2d 145, 152 (E.D.N.Y.2003) (affiliated, but separate, entities may properly collect a creditor's debts without violating the FDCPA). At most, the foreclosure pleadings were defective for failure to name Citibank FSB, which the state court allowed CitiMortgage to correct, but they do not rise to the level of false representations. Acosta's claims in ¶ 133(g), (h), and (i) are due to be dismissed.

VI. FDUPTA (COUNT V)

Defendants contend that Count V, brought under the Florida Deceptive and Unfair Trade Practices Act ("DTPA"), should be dismissed because the Act does not apply to the sale and purchase of real estate, citing Larry Kent Homes, Inc. v. Empire of America FSA, 474 So.2d 868, 869 (Fla. 5th DCA 1985), rev. denied, 484 So.2d 7 (Fla.1986). However, the DTPA was modified in 1993 to broaden the Acts' definition of "trade or commerce" to include the sale "of any property," and at least one Florida appellate

court has acknowledged that the amended Act encompasses real estate sales. Fendrich v. RBF, LLC, 842 So.2d 1076, 1079-80 n. 2 (Fla. 4th DCA 2003) (holding that a reservation for the purchase of real estate can constitute a deceptive trade practice). More recently, at least one Florida appellate court considering claims by mortgagors against a collection agency for the lender allowed the claims to go forward under the DTPA. See Echevarria, McCalla, Raymer, Barrett & Frappier v. Cole, 896 So.2d 773, 777 (Fla. 1st DCA 2004) (reinstating DTPA claims by a class of defaulting mortgagors suing law firm handling foreclosure proceedings over inflated costs to reinstate mortgages); see also Chase Manhattan Mortg. Corp. v. Porcher, 898 So.2d 153, 156 (Fla. 4th DCA 2005) (holding that plaintiffs with claims against lender for wrongful assessment of late fees on mortgages could not be certified as a class action but implicitly ruling they could be brought under DTPA as individual claims).

*18 Although a mortgagor might otherwise be able to state a claim arising for relief under the DTPA for a lender or debt collector's conduct arising out of the mortgage negotiations or the collection efforts, Acosta's Third Amended Complaint fails to do so. In Count V asserting his DTPA claim, Acosta merely regurgitates the same allegations verbatim that he asserted for violations of the FDCPA and RICO claims, including the citations to those federal statutes, and fails to even reference the DTPA. See Doc. No. 103 ¶ 174-76. Acosta states no specific facts whatsoever in support of his claim for violation of the DTPA. Given that this is Acosta's fourth attempt in more than twelve months to state a claim under the DTPA, he is not entitled to any further amendments

and Acosta's claim under the DTPA should be dismissed with prejudice.

CONCLUSION

Acosta has completely failed to plead a RICO claim. He has alleged no facts to sustain a claim for civil recovery under RICO, and the facts that have been alleged demonstrate conclusively that no such claim could be proven. The Court finds that Acosta would not be entitled to recovery under any set of facts that could be proven consistent with the allegations in his Third Amended complaint. To the extent that Defendants' Motions to Dismiss seek to dismiss Acosta's federal and Florida RICO claims (Counts I and II) and his FDUTPA claim (Count V), it is RECOMMENDED that the Motions to Dismiss be GRANTED in part and that those claims be DISMISSED with prejudice.

To the extent Defendants seek to dismiss Acosta's FDCPA and Florida Consumer Credit Protection Act claims (Counts III and IV), it is RECOMMENDED that they be GRANTED in part and DENIED in part, with Acosta's claims in ¶ ¶ 133(b), (c), (e), (f)-(i) being DISMISSED with prejudice and only Acosta's two claims in ¶ ¶ 133(a) and (d) be allowed to go forward.

Failure to file written objections to the proposed findings and recommendations contained in this report within ten (10) days from the date of its filing shall bar an aggrieved party from attacking the factual findings on appeal.

Recommended in Orlando, Florida on November 4, 2005.

15 U.S.C. § 1692. Congressional findings and declaration of purpose

(a) Abusive practices

There is abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors. Abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy.

(b) Inadequacy of laws

Existing laws and procedures for redressing these injuries are inadequate to protect consumers.

(c) Available non-abusive collection methods

Means other than misrepresentation or other abusive debt collection practices are available for the effective collection of debts.

(d) Interstate commerce

Abusive debt collection practices are carried on to a substantial extent in interstate commerce and through means and instrumentalities of such commerce. Even where abusive debt collection practices are purely intrastate in character, they nevertheless directly affect interstate commerce.

(e) Purposes

It is the purpose of this subchapter to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote

consistent State action to protect consumers against debt collection abuses.

15 U.S.C. § 1692a. Definitions

As used in this subchapter--

(1) The term "Commission" means the Federal Trade Commission.

(2) The term "communication" means the conveying of information regarding a debt directly or indirectly to any person through any medium.

(3) The term "consumer" means any natural person obligated or allegedly obligated to pay any debt.

(4) The term "creditor" means any person who offers or extends credit creating a debt or to whom a debt is owed, but such term does not include any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another.

(5) The term "debt" means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment.

(6) The term "debt collector" means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. Notwithstanding the exclusion provided by clause (F) of the last sentence of this paragraph, the

term includes any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts. For the purpose of section 1692f(6) of this title, such term also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests. The term does not include--

(A) any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor;

(B) any person while acting as a debt collector for another person, both of whom are related by common ownership or affiliated by corporate control, if the person acting as a debt collector does so only for persons to whom it is so related or affiliated and if the principal business of such person is not the collection of debts;

(C) any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties;

(D) any person while serving or attempting to serve legal process on any other person in connection with the judicial enforcement of any debt;

(E) any nonprofit organization which, at the request of consumers, performs bona fide consumer credit counseling and assists consumers in the liquidation of their debts by receiving payments from such consumers and distributing such amounts to creditors; and

(F) any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity (i) is incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement; (ii) concerns a debt which was originated by such person; (iii) concerns a debt which was not in default at the time it was obtained by such person; or (iv) concerns a debt obtained by such person as a secured party in a commercial credit transaction involving the creditor.

(7) The term "location information" means a consumer's place of abode and his telephone number at such place, or his place of employment.

(8) The term "State" means any State, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any political subdivision of any of the foregoing.

15 U.S.C. § 1692c. Communication in connection with debt collection

(a) Communication with the consumer generally

Without the prior consent of the consumer given directly to the debt collector or the express permission of a court of competent jurisdiction, a debt collector may not communicate with a consumer in connection with the collection of any debt--

(1) at any unusual time or place or a time or place known or which should be known to be inconvenient to the consumer. In the absence of knowledge of circumstances to the contrary, a debt collector shall assume that the convenient time for communicating with a consumer is after 8 o'clock antemeridian and before 9 o'clock postmeridian, local time at the consumer's location;

(2) if the debt collector knows the consumer is represented by an attorney with respect to such debt and has knowledge of, or can readily ascertain, such attorney's name and address, unless the attorney fails to respond within a reasonable period of time to a communication from the debt collector or unless the attorney consents to direct communication with the consumer; or

(3) at the consumer's place of employment if the debt collector knows or has reason to know that the consumer's employer prohibits the consumer from receiving such communication.

(b) Communication with third parties

Except as provided in section 1692b of this title, without the prior consent of the consumer given directly to the debt collector, or the express

permission of a court of competent jurisdiction, or as reasonably necessary to effectuate a postjudgment judicial remedy, a debt collector may not communicate, in connection with the collection of any debt, with any person other than the consumer, his attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector.

(c) Ceasing communication

If a consumer notifies a debt collector in writing that the consumer refuses to pay a debt or that the consumer wishes the debt collector to cease further communication with the consumer, the debt collector shall not communicate further with the consumer with respect to such debt, except--

(1) to advise the consumer that the debt collector's further efforts are being terminated;

(2) to notify the consumer that the debt collector or creditor may invoke specified remedies which are ordinarily invoked by such debt collector or creditor; or

(3) where applicable, to notify the consumer that the debt collector or creditor intends to invoke a specified remedy.

If such notice from the consumer is made by mail, notification shall be complete upon receipt.

(d) "Consumer" defined

For the purpose of this section, the term "consumer" includes the consumer's spouse, parent (if the consumer is a minor), guardian, executor, or administrator.

15 U.S.C. § 1692d. Harassment or abuse

A debt collector may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

(1) The use or threat of use of violence or other criminal means to harm the physical person, reputation, or property of any person.

(2) The use of obscene or profane language or language the natural consequence of which is to abuse the hearer or reader.

(3) The publication of a list of consumers who allegedly refuse to pay debts, except to a consumer reporting agency or to persons meeting the requirements of section 1681a(f) or 1681b(3) of this title.

(4) The advertisement for sale of any debt to coerce payment of the debt.

(5) Causing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number.

(6) Except as provided in section 1692b of this title, the placement of telephone calls without meaningful disclosure of the caller's identity.

15 U.S.C. § 1692e. False or misleading representations

A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

(1) The false representation or implication that the debt collector is vouched for, bonded by, or affiliated with the United States or any State, including the use of any badge, uniform, or facsimile thereof.

(2) The false representation of--

(A) the character, amount, or legal status of any debt; or

(B) any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt.

(3) The false representation or implication that any individual is an attorney or that any communication is from an attorney.

(4) The representation or implication that nonpayment of any debt will result in the arrest or imprisonment of any person or the seizure, garnishment, attachment, or sale of any property or wages of any person unless such action is lawful and the debt collector or creditor intends to take such action.

(5) The threat to take any action that cannot legally be taken or that is not intended to be taken.

(6) The false representation or implication that a sale, referral, or other transfer of any interest in a debt shall cause the consumer to--

(A) lose any claim or defense to payment of the debt; or

(B) become subject to any practice prohibited by this subchapter.

(7) The false representation or implication that the consumer committed any crime or other conduct in order to disgrace the consumer.

(8) Communicating or threatening to communicate to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed.

(9) The use or distribution of any written communication which simulates or is falsely represented to be a document authorized, issued, or approved by any court, official, or agency of the United States or any State, or which creates a false impression as to its source, authorization, or approval.

(10) The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.

(11) The failure to disclose in the initial written communication with the consumer and, in addition, if the initial communication with the consumer is oral, in that initial oral communication, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose,

and the failure to disclose in subsequent communications that the communication is from a debt collector, except that this paragraph shall not apply to a formal pleading made in connection with a legal action.

(12) The false representation or implication that accounts have been turned over to innocent purchasers for value.

(13) The false representation or implication that documents are legal process.

(14) The use of any business, company, or organization name other than the true name of the debt collector's business, company, or organization.

(15) The false representation or implication that documents are not legal process forms or do not require action by the consumer.

(16) The false representation or implication that a debt collector operates or is employed by a consumer reporting agency as defined by section 1681a(f) of this title.

15 U.S.C. § 1692g. Validation of debts

(a) Notice of debt; contents

Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, unless the following information is contained in the initial communication or the consumer has paid the debt, send the consumer a written notice containing--

(1) the amount of the debt;

(2) the name of the creditor to whom the debt is owed;

(3) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector;

(4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and

(5) a statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.

(b) Disputed debts

If the consumer notifies the debt collector in writing within the thirty-day period described in

subsection (a) of this section that the debt, or any portion thereof, is disputed, or that the consumer requests the name and address of the original creditor, the debt collector shall cease collection of the debt, or any disputed portion thereof, until the debt collector obtains verification of the debt or a copy of a judgment, or the name and address of the original creditor, and a copy of such verification or judgment, or name and address of the original creditor, is mailed to the consumer by the debt collector. Collection activities and communications that do not otherwise violate this subchapter may continue during the 30-day period referred to in subsection (a) of this section unless the consumer has notified the debt collector in writing that the debt, or any portion of the debt, is disputed or that the consumer requests the name and address of the original creditor. Any collection activities and communication during the 30-day period may not overshadow or be inconsistent with the disclosure of the consumer's right to dispute the debt or request the name and address of the original creditor.

(c) Admission of liability

The failure of a consumer to dispute the validity of a debt under this section may not be construed by any court as an admission of liability by the consumer.

(d) Legal pleadings

A communication in the form of a formal pleading in a civil action shall not be treated as an initial communication for purposes of subsection (a) of this section.

(e) Notice provisions

The sending or delivery of any form or notice which does not relate to the collection of a debt and is expressly required by the Internal Revenue Code of 1986, chapter 94 of this title [15 U.S.C.A. § 6801 et seq.], or any provision of Federal or State law relating to notice of data security breach or privacy, or any regulation prescribed under any such provision of law, shall not be treated as an initial communication in connection with debt collection for purposes of this section.

Title XXXIII. Regulation of Trade, Commerce, Investments, and Solicitations

Chapter 559. Regulation of Trade, Commerce, and Investments, Generally (Refs & Annos)

Part VI. Consumer Collection Practices

§ 559.72 Florida Statutes

559.72. Prohibited practices generally

In collecting consumer debts, no person shall:

(1) Simulate in any manner a law enforcement officer or a representative of any governmental agency;

(2) Use or threaten force or violence;

(3) Tell a debtor who disputes a consumer debt that she or he or any person employing her or him will disclose to another, orally or in writing, directly or indirectly, information affecting the debtor's reputation for credit worthiness without also informing the debtor that the existence of the dispute will also be disclosed as required by subsection (6);

(4) Communicate or threaten to communicate with a debtor's employer prior to obtaining final judgment against the debtor, unless the debtor gives her or his permission in writing to contact her or his employer or acknowledges in writing the existence of the debt after the debt has been placed for collection, but this shall not prohibit a person from telling the debtor that her or his employer will be contacted if a final judgment is obtained;

(5) Disclose to a person other than the debtor or her or his family information affecting the debtor's reputation, whether or not for credit worthiness,

with knowledge or reason to know that the other person does not have a legitimate business need for the information or that the information is false;

(6) Disclose information concerning the existence of a debt known to be reasonably disputed by the debtor without disclosing that fact. If a disclosure is made prior to such reasonable dispute having been asserted and written notice is received from the debtor that any part of the debt is disputed and if such dispute is reasonable, the person who made the original disclosure shall reveal upon the request of the debtor within 30 days the details of the dispute to each person to whom disclosure of the debt without notice of the dispute was made within the preceding 90 days;

(7) Willfully communicate with the debtor or any member of her or his family with such frequency as can reasonably be expected to harass the debtor or her or his family, or willfully engage in other conduct which can reasonably be expected to abuse or harass the debtor or any member of her or his family;

(8) Use profane, obscene, vulgar, or willfully abusive language in communicating with the debtor or any member of her or his family;

(9) Claim, attempt, or threaten to enforce a debt when such person knows that the debt is not legitimate or assert the existence of some other legal right when such person knows that the right does not exist;

(10) Use a communication which simulates in any manner legal or judicial process or which gives the appearance of being authorized, issued or approved by a government, governmental agency, or attorney at law, when it is not;

(11) Communicate with a debtor under the guise of an attorney by using the stationery of an attorney or forms or instruments which only attorneys are authorized to prepare;

(12) Orally communicate with a debtor in such a manner as to give the false impression or appearance that such person is or is associated with an attorney;

(13) Advertise or threaten to advertise for sale any debt as a means to enforce payment except under court order or when acting as an assignee for the benefit of a creditor;

(14) Publish or post, threaten to publish or post, or cause to be published or posted before the general public individual names or any list of names of debtors, commonly known as a deadbeat list, for the purpose of enforcing or attempting to enforce collection of consumer debts;

(15) Refuse to provide adequate identification of herself or himself or her or his employer or other entity whom she or he represents when requested to do so by a debtor from whom she or he is collecting or attempting to collect a consumer debt;

(16) Mail any communication to a debtor in an envelope or postcard with words typed, written, or printed on the outside of the envelope or postcard calculated to embarrass the debtor. An example of this would be an envelope addressed to "Deadbeat, Jane Doe" or "Deadbeat, John Doe";

(17) Communicate with the debtor between the hours of 9 p.m. and 8 a.m. in the debtor's time zone without the prior consent of the debtor;

(18) Communicate with a debtor if the person knows that the debtor is represented by an attorney

with respect to such debt and has knowledge of, or can readily ascertain, such attorney's name and address, unless the debtor's attorney fails to respond within a reasonable period of time to a communication from the person, unless the debtor's attorney consents to a direct communication with the debtor, or unless the debtor initiates the communication; or

(19) Cause charges to be made to any debtor for communications by concealment of the true purpose of the communication, including collect telephone calls and telegram fees.

***Residential Funding Corporation v. David Acosta*, CASE NO. 03-CA-0558-14-L ORDER Granting Summary Judgment**

IN THE CIRCUIT COURT FOR THE EIGHTEENTH JUDICIAL CIRCUIT, IN AND FOR SEMINOLE COUNTY, FLORIDA

CASE NO. 03-CA-0558-14-L

RESIDENTIAL FUNDING CORPORATION, TRUSTEE,

Plaintiff,

DAVID ACOSTA, et. al.,

Defendants.

_____/

DAVID ACOSTA,

Cross-Plaintiff,

RESIDENTIAL FUNDING CORPORATION, MORTGAGE CAPITAL ASSOCIATES, INC.

Cross-Defendants.

_____/

ORDER ENTERING SUMMARY JUDGMENT IN FAVOR OF DEFENDANT DAVID ACOSTA

THIS CAUSE came to be heard before the Court on November 8, 2006, on Defendant David Acosta's Motion for Summary Judgment. This Court, having heard arguments and having been duly advised of the depositions, interrogatories, and affidavits filed with this Court, makes the following findings:

Plaintiff Residential Funding Corporation has filed a Complaint against Defendant David Acosta to recover amounts due on a mortgage ("Note") alleged to be in default. Plaintiff alleges that Defendant has failed to make the payment due August 1,2002, and all subsequent payments.

Plaintiff has stated by affidavit that on June 23, 2000, prior to commencing this action, Plaintiff sold the Note to Summit Bank. Summit Bank was acquired by Fleet Bank, which in turn was acquired by Bank of America, who is now the actual owner and holder of the Note. See

Affidavit ofMarcia Neira, July 21, 2006. Defendant alleges that as a result of the sale of the Note, Plaintiff does not have standing to maintain this suit.

To satisfy the requirement of standing, the plaintiff must show that a case or controversy exists between the plaintiff and the defendant, and that such case or controversy continues from the commencement through the existence of the litigation. See *Ferreiro v. Philadelphia Indemn. Ins. Co.*, 928 So.2d 374 (Fla. 3d DCA 2006), citing *Montgomery v. Dept. of Health and Rehabilitative Serv.*,468 So.2d 1014 (Fla. 1st DCA 1985). Plaintiff alleged in the Complaint, filed on February 28, 2003, that it was the owner of the Note in question.

Whether through inadvertent error or bad faith, Plaintiff clearly is not the owner of the Note. Plaintiff has filed a subsequent Affidavit of Marcia Neira ("Neira") in Opposition to Defendant's Motion for Summary Judgment, filed on November 7, 2006, in which Plaintiff states that "[p]ursuant to the Sale and Servicing Agreement between Residential Funding Corporation and Summit Bank, attached as Exhibit 'A' to my Affidavit of July 2 1, 2006, Residential Funding Corporation was the master servicer of the loan in question in this matter, and, as such, had authority to institute this foreclosure action."

Defendant contends that the Sale and Servicing Agreement ("Agreement") was not properly certified. The Agreement was attached to the original Affidavit of July 21, 2006, in which Neira attested that Plaintiff "does not service the loan and does not have an ownership interest in the loan at all." The Agreement was not attached to the Affidavit of November 7, 2006, in which Neira stated that Plaintiff was the master servicer of the Note, but was only incorporated by reference.

Merely attaching documents which are not sworn to or certified to motion for summary judgment does not, without more, satisfy procedural strictures of rule governing affidavits and certified attachments. *Bifulco v. State Farm Mut. Auto. Ins.* Co.. 693 So.2d 707 (Fla. 4' DCA 1997).

However, there is obvious conflict in the affidavits of Neira dated July 21, 2006 and November 7, 2006. Parties cannot be permitted to assert conflicting affidavits. *Grauer v. Occidental Life Insurance Company of California*, 363 So.2d 583 (Fla. 1" DCA 1978), cert. denied, 372 So.2d 468 (Fla. 1979). As such, the Court may disregard the affidavits. The remaining evidence indicates that Plaintiff does not have standing to maintain this action.

THEREFORE,

IT IS ADJUDGED

Summary judgment is entered in favor of Defendant David Acosta.

DONE AND ORDERED in Chambers in Sanford, Florida, Seminole County, Florida this 15th day of November, 2006.

JOHN D. GALLUZZO, Circuit Judge

Residential Funding Corporation v. David Acosta, 965 So.2d 149 (Fla. 5th DCA 2007)

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FIFTH DISTRICT

JULY TERM 2007

RESIDENTIAL FUNDING CORPORATION

Appellant,

v. Case No. 5D06-4301

DAVID ACOSTA, ET AL,

Appellees.

_____/

Decision filed September 11, 2007

Appeal from the Circuit Court
for Seminole County,
John D. Galluzzo, Judge.

Christopher L. Casey and H.Keith Thomerson, of Hinshaw & Culbertson LLP, Jacksonville, for Appellant.

David Acosta, Longwood, *pro se*.

No Appearance for other Appellees.

PER CURIAM.

AFFIRMED.

PALMER, C.J., THOMPSON and SAWAYA, JJ., concur.

AFFIDAVIT FILED BY RESIDENTIAL FUNDING CORPORATION ON AUGUST 28, 2006

IN THE CIRCUIT COURT OF THE
18TH JUDICIAL CIRCUIT IN AND
FOR SEMINOLE COUNTY, FLORIDA

RESIDENTIAL FUNDING CORPORATION, as Trustee,

Plaintiff,

v.

DAVID ACOSTA, et al.,

Defendants

CASE NO: 03-CA-558-14-L

/

AFFIDAVIT

STATE OF CALIFORNIA)

COUNTY OF LOS ANGELES)

Before me, the undersigned authority, personally appeared Marcia Neira, who first being duly sworn, states as follows

1. My name is Marcia Neira and I am a Senior Asset Manager with Residential Funding Corporation. I have been employed in this capacity for 14 years.

2 I am over the age of 18 years old and I am competent to testify concerning the matters addressed herein.

3. In my capacity as Senior Asset Manager of Residential Funding Corporation I have reviewed the company's files and records kept in the ordinary course of business, and I am familiar with the disposition of the loan of David Acosta in question in this case.

4 Pursuant to the terms of the Sale and Servicing Agreement between Residential Funding Corporation and Summit Bank, attached hereto as Exhibit "A", Summit Bank purchased Mr. Acosta's loan (among other home loans referenced therein) on June 23, 2000. The loan

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therefore ceased to be owned by Residential Funding Corporation and became the property of Summit Bank.

5 To the best of my knowledge, after the sale of this loan to Summit Bank, Summit Bank was acquired by Fleet Bank, which was thereafter acquired by Bank of America

6 Bank of America now owns the loan of David Acosta in dispute in this case Residential Funding Corporation does not service the loan and does not have an ownership interest in the loan at all.

FURTHER AFFIANT SAYETH NAUGHT.

Marcia Neira

BEFORE ME, the undersigned authority, personally appeared, Marcia Neira, who is personally known to me/who produced Senior Asset Manager as identification, and who did take an oath and stated that he executed the foregoing answers to interrogatories and that the same are true and correct to the best of his information, knowledge and belief.

SWORN TO and SUBSCRIBED before me this 21st day of July, 2006

Notary Public
Michelle R. Dale

My Commission Expires
June 21, 2010

MICHELLE R. DALE
Commission # 1471990
Notary Public - California
Los Angeles County
My Comm. Expires Jun 21, 2010